Westside Community Mental Health Center, Inc. ***and*** **Service Employees International Union, Local 790, AFL–CIO.** Cases 20–CA–27727, 20–CA–27889, and 20–CA–28007

February 19, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On April 2, 1998, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief in which the General Counsel also responds to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Westside Community Mental Health Center, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying bargaining unit employee requests to be represented by a union representative during an investigatory interview in which employees have reason to believe disciplinary action would be, or is in fact, taken against them.

(b) Prohibiting employees from discussing their discipline with other employees at any time.

(c) Unilaterally, and without providing notice to the Union, or discriminatorily implementing a new policy concerning how employees could use their lunch hours and compensatory time.

(d) Refusing to provide the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as the exclusive bargaining representative of an appropriate unit of the Respondent's employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule limiting employees' use of their lunch hour and compensatory time.

(b) Furnish to the Union in a timely fashion the information requested by the Union in its letters dated March 4, 25, and 27, 1997.

(c) Within 14 days after service by the Region, post at its Vallejo, California office copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 3, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] We agree with the judge that the Respondent unlawfully denied employees' requests for union representation at investigatory interviews that the employees reasonably believed might result in disciplinary action against them. We shall modify the judge's recommended Order to provide the standard remedy for such a violation. *Beverly Farm Foundation*, 323 NLRB 787, 799 (1997).

The recommended Order contains "in any other manner" remedial language. We find that a broad cease-and-desist order is not warranted in this case. Accordingly, we shall substitute a narrow cease-and-desist order. *Hickmott Foods*, 242 NLRB 1357 (1979).

We shall also modify the notice-posting provision of the recommended Order to conform to *Excel Container, Inc*., 325 NLRB 17 (1997).

Finally we shall modify par. 2(b) of the recommended Order to require the Respondent to provide information that the Union requested, without the necessity of making a new request. *I & F Corp.,* 322 NLRB 1037 fn. 1 (1997).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT deny your requests to be represented by a union representative during an investigatory interview in which you have reason to believe disciplinary action would be or is in fact taken against you.

WE WILL NOT prohibit you from discussing discipline taken against you with other employees at any time.

WE WILL NOT unilaterally, and without providing notice to the Union, or discriminatorily implementing a new policy concerning how you can use your lunch hour and compensatory time.

WE WILL NOT refuse to provide the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties as your exclusive bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilaterally implemented policy concerning use of your lunch hour and compensatory time.

WE WILL in a timely fashion furnish to the Union the information it requested on March 4, 25, and 27, 1997.

WESTSIDE COMMUNITY MENTAL HEALTH CENTER, INC.

Lucille Rosen, Esq., for the General Counsel
J. Mark Montobbio, Esq. (Ragghianti, Freitas, Montobbio & Wallace, LLP), of San Rafael, California, for the Respondent.
Daz Lamparas, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge**.** These consolidated cases were tried on January 20, 1998, at San Francisco, California.[1] The charge in Case 20–CA–27727 was filed by the Service Employees International Union, Local 790, AFL–CIO (the Union or the Charging Party), on March 21, against Westside Community Mental Health Center, Inc. (Respondent or Westside). The charges in Cases 20–CA–27889 and 20–CA–28007 were filed on June 26 and September 5, respectively. The Regional Director for Region 20, issued an order consolidating these cases on December 31.

The consolidated compliant (complaint), as amended,[2] alleges Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Principally, the complaint alleges Respondent violated Section 8(a)(1) of the Act by: denying employees Carolyn Hollenbeck's and Alice Spencer's requests for representation during interviews where these employees had reasonable cause to believe the interviews could result in disciplinary action being taken against them, and by maintaining and enforcing an overly broad confidentiality rule that prohibits suspended and/or discharged employees from discussing their employment situation with their coworkers.

The alleged violations of Section 8(a)(3) and (1) involve former employee Roger Buck. The complaint claims Respondent prohibited Buck from bringing his dog into one of Respondent's facilities after closing time; prohibited Buck from using his lunchtime and/or compensatory time to attend union meetings, and changed Buck's work schedule because Buck engaged in concerted protected activities, and to discourage employees from engaging in such activities.

The complaint further alleges Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information; and, by unilaterally making changes in its unit employees terms and conditions of employment, thereby failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees.

The information requested by the Union regarded: (1) information relative to Hollenbeck's suspension, Spencer's discharge, and Respondent's treatment of Buck; (2) information concerning Respondent's contracts with the city and county of San Francisco (San Francisco); and, (3) copies of all disciplinary notices, warnings or records of disciplinary actions for the last year. The alleged unilateral changes include: (1) the creation of a bargaining unit position entitled "Administrative Assistant II," (2) altering its policies concerning approved uses of lunchtime and "comp" time; and (3) imposing a requirement all its employees be fingerprinted.

Respondent's timely filed answer to the complaint, as amended, admits certain allegations, denies others, and denies any wrongdoing. Respondent asserts it rectified the denials of representatives to Hollenbeck and Spencer, claims it rectified the restrictions on Buck's use of his lunch hour and "comp" time, and denies the requested information is relevant. As an affirmative defense, Respondent claims the Union's failure to comply with the filing and registration requirements of Section 201(a) of the Labor Management Relations Act disqualifies the Union from any remedy under the Act.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

[1] All dates are in 1997 unless otherwise indicated.

[2] At the commencement of this hearing, General Counsel withdrew par. 6(a) of the consolidated complaint, G.C. Exh. 1(n), which asserted Respondent created the impression of surveillance.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

Based on Respondent's answer to the complaint, as amended at hearing, I find it meets one of the Board's jurisdictional standards and the Union is a statutory labor organization. Respondent admits the Union meets the criteria set forth in Section 2(5) of the Act.[4] I find without merit Respondent's claim the Union should not be considered a statutory labor organization because it failed to comply with Section 201(a) of the Labor Management Reporting and Disclosure Act (LMRDA).

The parties stipulated the Union has not filed to date an LM-2 form. Respondent has taken a similar position at the hearing in *Westside Community Mental Health Inc.*, Case 20–RC–17202, which issued December 2, 1996. The issue of the Union's labor organization status was fully litigated in *Multivue Inc., d/b/a The Lusty Lady*, Case 20–RC–17173 (July 30) 1996. As found, without appeal, in *Westside Community Mental Health Inc.*, supra, labor organization status under Section 2(5) of the Act is not affected by violations of the LMRDA. Cf. *Alto Plastics Mfg. Corp.*, 136 NLRB 850 (1962); *Chicago Pottery Co.*, 136 NLRB 1247 (1962); *Neiser Supermarkets*, 142 NLRB 513 fn. 3 (1963), *Harlem River Consumers Cooperative*, 191 NLRB 314 (1971); and *Caesar's Palace*, 194 NLRB 818 (1972). Thus, Respondent's claim the Union is disqualified from any remedy is unpersuasive.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is a California nonprofit corporation which is engaged in providing mental health, substance abuse, and AIDS services at various locations in San Francisco. Respondent's Executive Director at all times here pertinent is Bea Stevens. Stevens testified Respondent directly operated a number of programs, including a crisis clinic at 888 Turk Street, where the employees report directly to Respondent. Other programs, such as a mobile crisis clinic at the same location, are operated with Respondent as a fiscal intermediary where Respondent employs the workers for that program and the city and county of San Francisco supervises the staff. Caroline Kaufman was a San Francisco employee who supervised Respondent's employees at the Mobile Crisis Center.

Currently, Respondent has over 200 employees including physicians, psychologists, social workers, marriage and family counselors, nurses, and clerical support staff. As here pertinent, the following individuals are admitted supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of the Act: Caroline Kaufman, program manager for the Mobile Crisis Treatment Team; Joseph Cosgrove, M.D., medical director of the Mobile Crisis Treatment Team; Valerie Edwards, chief program officer for Westside Community Health; Shryel Joe, human resource manager; and Lorraine Kilpack, Ph.D., program manager for adult services.

The Union filed a representation petition in 20–RC–17202 on October 18, 1996. The decision and direction of election issued on December 2, 1996. On January 15, an election was conducted in the admittedly appropriate unit[5] and the certification of representative was issued on January 23, 1997. The parties are still negotiating and there is no collective-bargaining agreement.

B. Alleged Violations of the Act

1. Events involving Hollenbeck and Spencer

It is undisputed that during their initial investigatory interviews, Respondent denied Carolyn Hollenbeck's and Alice Spencer's requests for a union representative and/or attorney. Respondent also did not dispute that Hollenbeck and Spencer reasonably believed these initial interviews might result in disciplinary action being taken against them. The parties stipulated Spencer "had reasonable cause to believe that there could be disciplinary action taken against her, and the documents in evidence indicate in fact she was terminated." Respondent admitted denying Hollenbeck's and Spencer's requests for representation under the mistaken belief the lack of a collective-bargaining agreement meant they had no right to union representation.

Hollenbeck, an LVN, has been employed by Respondent for the last 5-1/2 years. Currently she is a dispensing nurse, phlebotomist, and TB nurse. She conducted a pregnancy test for a casual employee at the methadone clinic. She disclosed the employee was pregnant to a coworker. During working time, Hollenbeck was called into an interview with Joe and Kilpack. At the end of the 2-1/2 to 3 hour meeting, Hollenbeck was informed she was suspended for a week while Joe and Kilpack further investigated the incident. Hollenbeck testified she thought she would be fired and was very intimidated during the first and second meetings with Joe and Kilpack.

Hollenbeck was not paid for the time she spent in this interview. Several days later she was called at home and told to report for further discussions the next day, a Thursday. This meeting lasted from about noon to 2 p.m. Hollenbeck was sure she would be fired after this interview but was informed by Joe and Kilpack she should report to work the following Monday. Joe and Kilpack also told Hollenbeck; "I was not to discuss my suspension with anyone, I was just to go back and do my job as though nothing happened."

In its defense, Respondent claims it was unaware of its legal obligations, that it held additional interviews to permit representation thus remedying any "technical violation." It also avers the facts underlying the discipline of these employees are not in dispute, and thus, union representation at the investigatory interviews would not have altered the outcomes, the suspension of Hollenbeck and termination of Spencer. Respondent urges me to exercise my discretion and not recommend any remedy for these "technical violations." Respondent on brief, erroneously claims Hollenbeck used its property to conduct a pregnancy test. The undisputed evidence was the employee who asked Hollenbeck to perform the test, provided the test kit.

The appropriateness of Hollenbeck's suspension is not in issue, just the refusal of the requested representative and the instruction to not discuss her discipline with anyone, Kilpack explained Hol-

[3] I specifically discredit any testimony inconsistent with my findings.

[4] Respondent specifically admitted:

[T]he Union is a labor organization in which employees are permitted to participate, and which exists for the purposes of negotiating contracts and representing employees with respect to their working conditions with various employers.

[5] The following unit is admittedly appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time, regular part-time and on-call professional and nonprofessional employees employed by the Employer at all of its San Francisco, California locations; excluding managerial employees, confidential employees, guards and supervisors as defined by the Act.

lenbeck was suspended for acting outside the scope of her work by administering the test to an individual who was not a client. Kilpack incorrectly understood Hollenbeck used Respondent's property in administering the test, for violating an oath of confidentiality by revealing patient information,[6] and for signing a WIC form[7] for the contract employee.

Kilpack admitted Hollenbeck "was told not to discuss this matter with her coworkers." The reason advanced by Kilpack for this directive was:

> Because of the conflicts and friction that had arisen between herself and other coworkers related to this situation and others, and it was very disruptive to the work place, and she was given guidance that she was to return to work and do her work, and not revisit this issue, and not, you know, get into arguments with people.

After her suspension without pay, and after Respondent realized Hollenbeck had been denied requested representation, she was afforded representation during a company established grievance procedure. The Union and Respondent had not agreed to grievance procedures during their ongoing negotiations. During this internal grievance proceeding,[8] Hollenbeck was permitted to have a union representative present. Daz Lamparas, a union representative, attended the proceeding with Hollenbeck. Hollenbeck wanted to have her suspension removed from her record and to be paid for, "at least for the time that I met with the—at their request, and I would have liked to have a union representative when I had asked for it."

In preparation for the internal grievance committee meeting, Lamparas sent Joe a letter claiming Hollenbeck was unjustly suspended without pay and requesting: (1) recision of the suspension and full backpay, (2) expunction of any reference to the incident and (3) "make whole in all ways." Respondent's representatives at the grievance meeting said they would let Hollenbeck know of their decision, but they never informed her of their determination, if any.

On March 27, Lamparas wrote Joe another letter, referencing Respondent's failure to observe Hollenbeck's *Weingarten* rights at the March 3 disciplinary meeting and requesting the following information:

> (1) A copy of Westside policy or policies that are relevant to the disciplinary action taken against the employee.
>
> (2) Name or names of witnesses, date, time, and place of incident's.
>
> (3) Any written report or documentation which supports Westside action against the employee.
>
> (4) Any disciplinary action taken by management against Ms. Hollenbeck in the last three years of her employment.
>
> (5) Minutes of the disciplinary meetings against Ms. Hollenbeck conducted by Westside on or before March 3, 1997;
>
> (6) Name or names of any person who are involved or implicated in this case.

All contact between Lamparas and Respondent concerning Hollenbeck occurred after Hollenbeck had already been suspended and Spencer terminated. Lamparas received a response to item 1 above only, and that was at the grievance proceeding. The Union was denied the rest of the requested information which Respondent claimed was confidential. Respondent did not offer any compromises or counterproposals concerning the provision of the sought information. Westside did not offer any specific explanations as to why it considered any of the sought information confidential. Lamparas attended the internal grievance proceeding for Hollenbeck but still had not received the information requested in items 2 through 6 of his letter.

The facts concerning Hollenbeck's asserted misconduct were not in dispute. However, the Union was concerned Hollenbeck admitted to certain matters during the first interview when she was denied the requested representation. Charging Party was also concerned the discipline was disparate. Lamparas indicated the reason he requested Hollenbeck's disciplinary history was:

> [T]he Union has no knowledge whether she was suspended, or she was disciplined in the past. The reason that the Union requested that is to find out whether or not the five day suspension is warranted, or whether the penalty fits the crime, or whether or not management applied progressive discipline, so the Union wanted to find out what, if there is any, that she was disciplined in the past. That was the intent of the letter.

Lamparas admitted Joe mentioned the suspension decision was based on the pregnancy test. The Union was not informed that Respondent did not consider Hollenbeck's past work and discipline history.

Spencer did not appear and testify. The facts concerning this alleged violation were either admitted or the subject of a stipulation. There is no claim in this proceeding that Hollenbeck's and Spencer's disciplines violated the Act.[9] It is undisputed Respondent placed Spencer on administrative leave after the initial investigatory interview of March 17. The second investigatory interview occurred on March 25. There was a third meeting on March 27, and Lamparas was present at this third meeting. Spencer was informed after the initial interview her administrative leave would continue until the investigation of the incident(s) leading to the discipline was concluded. Then it would be determined if Spencer's leave would be with or without pay. Spencer was also informed in a telegram signed by Edwards: "During the time you are on Administrative leave of absence, you are not to report to work or contact any Westside client or staff member." Respondent determined Spencer should be terminated. Spencer was a member of the union bargaining committee.

[6] Hollenbeck was asked to execute what Kilpack understood to be a second confidentiality oath because, according to Kilpack, Hollenbeck was unclear about the requirements of the oath. The record is not clear whether Hollenbeck ever executed a similar confidentiality oath prior to March 11, 1997. Hollenbeck admitted she previously signed a confidentiality oath but did not recall the contents of that oath.

[7] WIC was described as a program where certain eligible single mothers receive certain benefits.

[8] Respondent's board has established a disciplinary procedure where the employee, after meeting with the executive director, has a personnel committee that allows the employee to present his or her position.

[9] Spencer was terminated for several reasons. According to Stevens, the primary reason was "because she was overheard by several staff making inappropriate racial and derogatory remarks. Fat cow, poor white trash, referring to fellow employees." The second listed reason was that on March 25, within 10 minutes after the conclusion of the investigatory interview where she was denied a union representative, and told not to come to the worksite, she was observed at the worksite contrary to instructions. Reason number 4 observed that during this time Spencer was caught "destroying agency documents and records." Stevens admitted:

Edwards testified she included this prohibition in the telegram because:

> We had numerous complaints of significant concerns around safety. Ten out of 12 staff people said they were fearful of her. They complained about symptoms as a result being nightmares, physically upset, they specified that they were worried about physical harm, they cited concerns around clients. There was at least one case in which more than one employee reported witnessing her saying about a client that was hers that was coming into the site, that she was going to kick his ass.

After learning Spencer did have a right to a union representative during the initial investigatory interview, probably from the Union, Respondent informed the Union:

> that we were correcting our position, that we were making her whole, that we were going back and doing the interview over again, and that she would be fully compensated in the intervening time, from the time that we first met with her to the time that we met with her with the union representative.

After this second meeting, Spencer was continued on administrative leave. Edwards did not know if Spencer was paid for any of the time she was on administrative leave. Spencer was terminated on April 4. Respondent did not place into evidence any of Spencer's payroll records.

Lamparas learned of Spencer's termination at the first collective-bargaining session, April 4, 1997. Previously, the Union had been informed disciplinary action had been taken by Respondent against Spencer and she had been placed on administrative leave. On March 25, Lamparas wrote Respondent protesting the disciplinary action taken against Spencer and claiming Respondent had violated her *Weingarten* right to union representation at the disciplinary meeting of March 25. Also in this letter, the Union requested Respondent to

> provide all necessary information that will justify all the allegations against the grievant, as follows:
>
> (1) Date, time, and place if the alleged incidents or infractions.
>
> (2) Name or names of witnesses of each incident.
>
> (3) Any Westside policy that is relevant to the action taken by management.
>
> (4) Any disciplinary action taken by management during the last two years of Ms. Spencer's employment.

The Union has not received any of the information requested concerning Spencer. After the announcement of Spencer's termination at the first negotiating session, Lamparas wrote Respondent requesting Spencer's reinstatement and attached a copy of a grievance form appealing her termination. The letter also reiterated the Union's March 25 request for information. Respondent had called Lamparas and informed him after Spencer had been placed on administrative leave that Westside "would conduct a re-investigation for the facts of her case." Pursuant to Spencer's request, Lamparas did participate on in the internal grievance proceeding in June.

Lamparas initially testified no one representing Respondent explained why they would not provide all the requested information concerning Spencer, other than claiming it was confidential. However, on cross-examination he admitted being informed by Respondent that the employees who complained about Spencer were afraid of her, that those who testified against her had to be protected because they were afraid of retaliation. Respondent did not claim it offered any accommodations to provide any of the information. As was the case with the Hollenbeck information request, Respondent did not offer any compromises or counterproposals.

> Q. And at least two of the reasons occurred on a time when she was not given union representation, although she requested it, isn't that correct?
>
> A. Yes.

Conclusions

a. The Weingarten issues

I find Respondent violated Section 8(a)(1) of the Act under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), by denying Hollenbeck's and Spencer's requests for union and/or legal representation at investigatory interviews they reasonably believed might result in disciplinary action against them. Respondent claims it rectified its mistake by permitting Hollenbeck and Spencer representation at their internal grievance hearings and holding a second interview for Spencer. I find this claim to be without merit. Respondent suspended Hollenbeck and terminated Spencer based on information obtained from them during their investigatory interviews where their requests for union and/or legal representation were denied. *AnchorTank, Inc.,* 239 NLRB 430, 431 (1978), enfd. in part and denied in part 618 F.2d 1153 (5th Cir. 1980)

As noted in *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982), "employees have a Section 7 right to consult with their representative before any interview to which *Weingarten* rights attach . . . for the right to prior consultation to have any meaning, the employee and his representative must have some indication of the matter being investigated for, without it, there is nothing about which to consult." While the *Pacific Telephone & Telegraph Co.*, id., decision dealt with an employee's right to a union and/or legal representative prior to the investigatory interview, the logic obtains to this case where the employees were denied their rights to consultation with, and representation by, their union representative during an investing interview.[10]

To later claim some if not all of this information was not in dispute begs the question. As found in *Williams Pipeline Co.*, 315 NLRB 1 (1994), the Supreme Court in *Weingarten,* supra, held:

> that an employee who is being subjected to an investigatory interview has the right to request the union representative. When the employee makes such a request, the employer must either grant the request, or advise the employee it (the employer) will not proceed with the interview unless the employee is willing to go on with the interview without a union representative.

In the instant case, Respondent refused to grant Hollenbeck's and Spencer's requests for a union and/or legal representative, failed to advise these employees it would not proceed without their acquiescence, and informed them they had no right to a representative. That Hollenbeck and Spencer remained and answered

[10] The Board further noted in the *Pacific Telephone,* case:

> [T]he construction of Section 7 affirmed by the Supreme Court in *Weingarten* represents a balance between employer "prerogatives" in investigation and disciplining misconduct and the right of employees to band together when their terms and conditions of employment are threatened by those "prerogatives.'' The weight of an employer's investigatory machinery against the isolated employee is an imbalance which Section 7 was designed to eliminate and one which we cannot ignore. [Footnote omitted.]

questions does not constitute waivers of their *Weingarten* rights. "It should not be a requisite of union representation that the lone employee further antagonize the employer and jeopardize his job by walking out of the meeting or refusing to answer questions. Id. See also *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977); *Super Valu Stores*, 236 NLRB 1581, 1591 (1978).

That Respondent later admitted the initial investigatory interviews of Hollenbeck and Spencer were unlawful is not effective repudiation of these coercive actions, nor does it render the violations de minimus. Respondent denied these employees requests for union and/or legal representation, and erroneously informed them they had no right to such representation. To later admit its error and permit representation at subsequent disciplinary proceedings does not work in mitigation or repudiation. Respondent does not disclaim relying on the information it received in the interviews where the employees were unrepresented. Spencer's termination was based, in part, on actions she took after the interview; actions she might not have taken if afforded the counsel of her union representative. Respondent's claim the presence of a representative would have made no difference is speculative and unconvincing.

Moreover, much of the information the Union sought in its attempts to represent Hollenbeck and Spencer was not provided by Respondent, further giving the impression it did not respect these employees' Section 7 rights. In these circumstances, I conclude Respondent's unlawful refusals to permit Hollenbeck and Spencer union representatives at their investigatory interviews was not effectively repudiated or otherwise palliated. *Passavant Memorial Hospital*, 237 NLRB 138 (1978); *United States Service Industries*, 324 NLRB 834, 837–838 (1997).

b. Maintenance of overly broad "confidentiality" rule

Based on Hollenbeck's credited evidence, I find Respondent instructed her "not to discuss my suspension with anyone, I was just to go back and do my job as though nothing happened." Hollenbeck's testimony was supported by the telegram sent Spencer instructing her: "During the time you are on Administrative leave of absence, you are not to report to work or contact any Westside client or staff member."

I find Respondent imposed a work rule upon Hollenbeck and Spencer which prohibited them from discussing their discipline with other employees. Respondent's witnesses asserted there was business justification for the work rule, which included the concerns of other employees and avoidance of disruption of the work place. I find the maintenance of such a rule prohibiting employees from discussing their alleged misdeeds which resulted in discipline with other employees "constitutes a clear restraint on employees right to engage in concerted activities for mutual aid and protection concerning undeniably significant terms of employment." *Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987).

Section 7 of the Act guarantees employees the rights "to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . other mutual aid or protection." As the Supreme Court noted in *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542–543 (1972). Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." See also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987); *Indian Hills Care Center*, 321 NLRB 144 (1996).

Respondent witnesses' testimony has failed to establish business reasons which outweigh the employees Section 7 rights to engage in concerted activities. While Kilpack referred to "conflicts and friction" that had arisen between Hollenbeck and coworkers concerning her administration of the pregnancy test and informing another employee of the results of the test, there were no details concerning the "conflicts and friction." The unrefuted testimony of Hollenbeck was that the individual who had the test had been joyfully telling other coworkers of the result. I conclude Kilpack's reasons do not provide a convincing basis to find Respondent's had an overriding interest in keeping Hollenbeck from discussing her discipline with other employees.

Edwards' reason for her instructions to Spencer was significant safety concerns. I find that while this reason may be overriding, Respondent, by making bare claims has failed to present sufficient detail to warrant the conclusion Spencer's discussing her disciplinary problems with any employee, friend or foe, raised a safety problem sufficient to overcome Spencer's Section 7 rights to engage in concerted activity. Respondent has failed to present sufficient information to permit the making of an informed decision concerning its assertion the rule was necessitated by employees fears of retaliation by Spencer. Respondent has failed to meet its burden of demonstrating there was an overriding need for the rule.

These prohibitions restricted these employees from possibly obtaining information from their coworkers which might be used in their defense. The prohibitions were not limited to worktime or even workplace. Respondent failed to inform Hollenbeck and Spencer they could discuss their disciplines with coworkers during nonworktime or outside of work. While there was no explicit penalty mentioned when Hollenbeck and Spencer were instructed not to discuss their discipline with other employees, the instruction still was sufficient to tend to inhibit employees from engaging in protected concerted activity. *Electronic Data Systems*, 278 NLRB 125, 130 (1986).

As the General Counsel noted, Respondent's rule restricted Hollenbeck and Spencer from exercising their rights to communicate with fellow employees regardless of whether the rule was enforced or discriminatorily motivated. Citing *The Loft*, 227 NLRB 1444 (1986); *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1041 (1991); *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 220 (1976); and *NLRB v. Coca-Cola Co. Foods Division*, 670 F.2d (7th Cir. 1982). The evidence of record requires the conclusion Respondent maintained an over broad confidentiality rule in violation of Section 8(a)(1) of the Act.

c. The information requests concerning Hollenbeck and Spencer

The Union requested information concerning the terms and conditions of employment of the employees employed within the bargaining unit it represents, thus, that information is "presumptively relevant" to the Union's proper performance of its collective-bargaining duties. The basis for the presumption is "this information is at the core of the employee-employer relationship," *Graphics Communications Local 13 v. NLRB*, 598 F.2d 267, 271 fn. 5 (D.C. Cir. 1959), and is relevant by its "very nature." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 887 (9th Cir. 1971). Respondent has not rebutted this presumption of relevance, rather it claims at hearing were the material is confidential and the requests were unduly burdensome.

As noted in *GTE California, Inc.*, 324 NLRB 424, 426 (1997):

> An employer has a statutory obligation to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its

> responsibilities regarding processing grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). . . .
>
> A union's interest in relevant and necessary information, however, does not always predominate over other legitimate interests. As the Supreme Court explained in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979) "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." Thus, in dealing with union requests for relevant but assertedly confidential information possessed by an employer, the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interest established by the employer. See e.g. *Exon Co. USA*, 321 NLRB 896 (1996); *Good Life Beverage Co.*, 312 NLRB 1060 (1993); *Pennsylvania Power*, supra [301 NLRB 1104 (1991)]; *Howard University*, 290 NLRB 1006 (1988). [Footnote omitted.]

While the grievance procedure was in-house and not based on a collective-bargaining agreement, the Union's representational interests are not any less. The Union's interest was legitimate and substantial. It was representing its members and, the Union had a right to request information relevant to its determination of whether Respondent breached existing practices and policies in disciplining Hollenbeck and Spencer, to advise the employees of their rights in the event they were treated disparately, and to otherwise represent these members in an appropriate fashion either through the internal grievance mechanism or otherwise. The Union has met the Board's liberal discovery like standard of "probable or potential relevance." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435 (1967).

While Respondent put into evidence the approximate number of personnel files it might have to search, it did not clearly establish a confidentiality interest in the requested information. Respondent did not inform the Union the request was considered unduly burdensome or fully and fairly explicate its claim of confidentiality. Initially, Respondent did not raise the claims of confidentiality or undue burden to Lamparas. Respondent failed to detail what aspects of the requested information was confidential. Respondent's bare assertion the requested information is confidential must fail for lack of evidence they requested materials contain any confidential information. *NLRB v. Pfizer, Inc.*, 763 F.2d 887, 890–891 (7th Cir. 1985); *Honda of Haward*, 314 NLRB 443, 451 (1994).

As the Board stated in *Pennsylvania Power Co.*, supra at 1105–1106:

> [A] party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests. [Footnote omitted.]

Respondent has failed to meet the requirement of *Pennsylvania Power*, for it did not inform the Union what requested material it considered to be confidential or why the request itself was unduly burdensome. The Union was precluded from negotiating alternative requests that may meet any of Respondent's legitimate objections. As noted in *Exon Co. USA*, supra at 898:

> It is also well settled that, as part of this balancing process, the party making a claim of confidentiality has the burden of proving that such interests are in fact present and of such significance as to outweigh the union's need for the information. *Jacksonville Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995).

I conclude Respondent has failed to timely raise and establish the legitimacy of its claims. There was no evidence concerning how Respondent maintains its personnel files and other records. Respondent has not claimed it made a promise of confidentiality to its employees. There may have been records or other information maintained by Respondent that made the task less burdensome. Respondent failed to provide an estimate of how many man hours were required for the preparation of the requested information. Respondent failed to detail the basis for its confidentiality claim. Thus, the record fails to provide a basis to find Respondent had a substantial interest in the confidentiality of the requested information. *Mary Thompson Hospital v. NLRB*, 943 F.2d 741 (7th Cir. 1991).

Moreover, an employer has a duty to furnish the union, upon request, the names of witnesses to the events upon which an employees discipline is based. *Transport of New Jersey*, 233 NLRB 694 (1994); *Anheuser Busch*, 237 NLRB 982, 984 fn. 5 (1978). I conclude Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the information requested relative to its representation of Hollenbeck and Spencer.

2. Events involving Buck

a. Barring the dog from the premises.

Buck is a former employee of Respondent, voluntarily terminating his employment with Westside in October 1997. The initial call to the Union about organizing Respondent was made by Buck. Buck was also the Union's contract action team member and a member of the organizing team. According to Lamparas, Buck was the link between the Union's bargaining committee and the unit employees at his job site. Buck was open about his union activities. Buck's name and picture appeared in union organizing literature. It is undisputed Respondent had knowledge of these activities.

Buck worked for Westside for 22 months as a clinician in the mobile crises unit. His shift was from 3 to 11 p.m. At the same time, he had a part-time job, working on Wednesdays as a school psychologist at a private elementary school from 8 a.m. until the start of his shift at Respondent. Buck's immediate supervisor was Kaufman; he also reported to Cosgrove. Buck advised Kaufman of his school job from the commencement of his employment with Respondent. Kaufman was not his supervisor at the time. He started both jobs at about the same time in 1995.

Buck used his golden retriever, which has been trained as a pet assistance dog, as part of his work at the school, starting about December 1995. He would then take the dog to work at Respondent. He asked Kaufman for permission to follow this practice. The dog was left in Buck's car until most of the employees had gone, about 9 p.m., and then he would bring the dog into Respondent's facility. Buck was required to go out on calls using Respondent's vehicles. On those occasions he went out on calls after bringing the dog into the facility, the dog would be left unattended. In May, Kaufman informed Buck he no longer could bring his dog to work. Buck claims he was issued a written warning.

Kilpack discovered the dog one Wednesday evening. Her office is located near a stairwell. That evening, Kaufman heard Buck say "Shhhhhh, don't tell anyone." To determine what Buck was refer-

ring to, Kilpack left her office and heard a jingling noise at the bottom of the stairs. She then observed a dog come into the stairwell and mount the stairs toward Buck. Kilpack received confirmation from Buck that it was his dog. She then informed Buck "that he could not have his dog at Westside in the clinic for health and safety reasons." Buck asked: "Like what?" Kilpack replied: "Well, like for one example, people are sometimes allergic to animals and might be having a reaction." Kilpack then instructed Buck to "not bring his dog back to work . . . for health and safety reasons."

It was Kilpack's belief "that animals would not be permitted, except for seeing-eye dogs.'' Kilpack sought confirmation of this belief from her supervisor, Edwards. Edwards indicated Respondent has never permitted either employees or clients to bring animals onto its premises with the exception of seeing-eye dogs. Edwards was unaware of Buck's practice of bringing his dog to work until informed by Kilpack. Stevens confirmed the policy stating: "With the exception of our school program, we do have an iguana, but staff—it's not owned by the staff, it's owned by the school and students, and they care for the iguana at the school site." This testimony by Kaufman, Kilpack, and Stevens was unrefuted.

The following April or May, about 2 weeks after the first incident with the dog, on a Wednesday at about 7:30 or 8 p.m., Kilpack again heard the jingling noise outside her office. She went into the hallway and saw the same dog walking down the hallway unattended. Kilpack went looking for Buck and was told he was out on a call. Kilpack then reported the matter to Kaufman. Buck denied bringing the dog a second time. I do not credit Buck's denial based on his demeanor. He did not appear open and forthright during this testimony. His visage clouded and he appeared to bear a grudge against Kilpack. He also appeared to engage in hyperbole. For example, he claimed he was issued a written warning for the dog incident. Kaufman said she asked him to not bring his dog in and Buck agreed, there was no warning. There was no written warning placed in evidence. According to Kaufman, "I wrote up the interaction about our agreement that the dog was no longer to come back to the facility."

Kaufman, who was not an employee of Respondent but is an admitted agent, appeared open and candid. Based on her demeanor, her testimony is credited. Supporting this conclusion was her direct manner, readily admitting when she could not recall a matter or did not know the answer to a question. Kaufman could not recall if she previously gave Buck permission to bring his dog to work on Wednesdays. When Kilpack informed her Buck was bringing his dog to work and leaving the dog unattended, Kaufman inquired if there was a policy about bringing dogs to work. Kilpack inquired what Kaufman's feelings were about Buck bringing his dog to work. Kilpack informed Kaufman it was Respondent's policy to not have animals at the facility. Kaufman told Kilpack "Fine, in that case I'll take care of it." Buck was not issued formal discipline for the "dog" incident, there is no claim and no evidence Respondent treated Buck disparately of failed to follow normal procedures.

Conclusions

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to . . . tenure of employment or any term or condition of employment . . . to discourage membership in any labor organization." An employer violates Section 8(a)(3) and (1) of the Act when it discriminates against an employee because of his union activities. See *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 955 (D.C. Cir. 1988), cert. denied 490 U.S. 1065 (1989). In this case disparate treatment has not been established.

The question in this case is the Respondent's motive for taking adverse action. Motive is a factual question usually resolved through inferences drawn from circumstantial evidence. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401–403 (1983), the Supreme Court approved the test for unlawful motivation stated in *Wright Line,* 251 NLRB 1083 (1980). Under *Wright Line,* a violation of the Act is established by showing the Respondent's opposition to protected activity was a motivating factor in the Respondent's decision to take adverse action against an employee, unless the employer is able to demonstrate, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *NLRB v. Transportation Management Corp.*, supra.

If the Respondent's proffered reason for an adverse action is shown to be a mere pretext to disguise discrimination, the inquiry ends, for at that point, it is clear the only motive for the Respondents' action was an unlawful one. See *Wright Line,* supra. It is without question Respondent was aware of at least some of Buck's union activities.

I find Kaufman knew and permitted Buck to bring his dog to work on Wednesdays. Kaufman could not recall if he brought his dog on Wednesdays. As held in *Indian Hills Care Center*, 321 NLRB 144, 151 (1996):

> First, a mere expression of inability to recall having made a particular statement hardly qualifies as a clear denial or refutation of having made it. Instead, inability to recall inherently leaves the record in the posture that it is as likely that the witness had made the statement attributed to him/her as it is likely that the witness had not made it. In effect, such an answer leaves the trier of fact to infer a denial that the witness was unwilling to voice. That would not be a proper inference. For, the lack of recollection answer "hardly qualifies as a refutation of . . . positive testimony and unquestionably was not enough to create an issue of fact between [X] on the one hand and [Y] and [Z] on the other." *Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 425 (4th Cir. 1981).

I find Respondent's reasons for terminating Buck's privilege of bringing his dog to work on Wednesdays were for valid business reasons. First, there is no evidence Respondent knowingly waived its rules barring pets for Buck. As noted above, Kaufman works for San Francisco and there is no evidence she informed Respondent she permitted Buck to bring his dog to work. Although Kaufman was an agent of Respondent, there was no demonstration she had authority to alter Respondent's policy against employees and clients bring pets onto its premises. The scope of her agency was not clearly established on the record. The credited evidence requires the conclusion Respondent was merely enforcing an existing ban, not altering an existent work rule or otherwise discriminating against Buck.

The General Counsel failed to prove Kaufman's decision was based in any part on animus or constituted disparate treatment. The testimony of Respondent's witnesses "that animals would not be permitted, except for seeing-eye dogs," is a matter of long standing company policy which Kaufman apparently did not know about until informed by Kilpack. This was not a new policy, there was no change in company policy. Kilpack offered Buck an explanation when she first informed him of the rule against bringing pets to work. The consistent application of the

rule once learning of a violation, does not constitute the imposition of more strict enforcement of the rule. Compare *Forest Park Ambulance Service*, 206 NLRB 550 (1973). I conclude this allegation of the complaint should be dismissed.

b. Use of lunch and/or compensatory time

Around May 20, Kaufman informed Buck "that I couldn't use my lunch hour, or my comp [compensatory] time, or any other time, to do union duties while at Westside. And she told me that Shryel Joe had told her that, that she was just passing on that information to me." Prior to this conversation, Buck had attended many union meetings during his lunch hour; he never had any restrictions placed on his lunch or compensatory time prior to this conversation.

Before leaving his office for such lunches, he would verbally inform Kaufman he was going to a union meeting, and he would take a telephone with him in the event Respondent wished to reach him. There was no claim he was ever late returning to work after attending a union meeting. Kaufman did not indicate to Buck that he was taking too long at the union meetings. He made it a practice to return on time.

Kaufman admitted instructing Buck he could not longer attend union meetings during his lunch hour and/or comp time. According to Kaufman:

> At one point I was told by Shryel Joe, the Manager for Human Resources at Westside, that none of Westside time could be used in going to union meetings.[11] I had some question about that myself, and went to my supervisor and asked about that, because I know that as a City and County employee, your lunch hour's your time. And that—we went back and I spoke with Ms. Joe again and that situation was remedied where it was what you do with your lunch hour is what you do with your lunch hour.

According to Buck, he was informed by Kaufman 3 or 4 weeks after the ban was imposed on his attending union meetings during his lunch or compensatory time that the ban was lifted. Kaufman recalled it was about a week and a half later that she informed Buck the ban had been lifted. Kaufman told Buck: "I had discussed it with my [City and County of San Francisco] supervisor and discussed it again with Westside, and that the agreement was that what people did on their lunch hour was their personal business." I find Respondent's claim Kaufman's actions were not attributable to it to be without merit under these circumstances. Kaufman was relaying Joe's instructions; she was acting as Respondent's admitted agent.

Conclusions

The record requires the conclusion Kaufman unlawfully related the change Joe effected in its rules as they pertained to Buck when she informed him he could not use his lunch hour or comp time to attend union meetings and perform other union duties. It is undisputed Respondent never limited its employees' use of lunch or compensatory time in the past. That Kaufman several days to a month later removed the unlawful restriction does not constitute repudiation.

I conclude the unilateral change in a term and condition of employment by implementing a new rule which limited an employees use of his lunch hour and other free time, Respondent has committed a violation of Section 8(a)(5), (3), and (1) of the Act. That the violation was not long-lived does not alter the fact it was a violation which adversely impacted upon the Union's role as the employees collective-bargaining representative and discriminatorialy limited an employees use of their free time. *Caterpillar, Inc.*, 321 NLRB 1178, 1182 (1996); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989), enfd. 939 F.2d 361 (6th Cir. 1991).

c. Changing Buck's work schedule

Buck was transferred to the day shift on or about August 23. When Buck was hired, he was asked if he would be available to work other shifts if necessary, and he replied he would. About 2 or 3 months after the union election, Buck was informed he was under investigation because he had been termed racist by another clinician, a coworker named Ricardo Aranda, and there were some other racist allegations. Buck also admitted being called into a meeting in June[12] with Kaufman and Cosgrove where he was advised a complaint had been made against him by Kilpack. Kaufman and Cosgrove advised Buck he had acted unprofessionally by calling Kilpack a "witch."

Kilpack, who is credited based on her mien and mannerisms, testified she was working late on or about Wednesday, June 19, when she heard Buck in the hallway outside her office comment, "That witch was here earlier." Buck's coworker noted, "Well, somebody's in there now." Kilpack went into the hall and asked Buck "who he was referring to." Buck replied, "I don't have to answer that."

Kilpack did warn Buck during their conversation:

> about using that kind of language in reference to anyone. That was part of my initial discussion with him, was that it would have been, even though he refused to say who he was referring to, and I was the only person in the building there, that it would have been inappropriate to use that kind of language with any staff, coworkers, or clients, and that he needed to be very careful about what he said at work that could be overheard. I believe that that would have been the first warning that he was given about his language.

The Respondent investigated the incident. Kaufman and Cosgrove spoke to Buck about calling Kilpack a witch. Buck denied making the statement when he was confronted by Kaufman and Cosgrove but he did not specifically deny making the statement in this proceeding. Even if he did deny making the comment, Kilpack's testimony is credited for she was the more credible witness. Because the incident was not substantiated, Buck was not formally disciplined for this behavior.

In July, Buck had made a complaint about Aranda to Kaufman. Included in this written complaint, which related some of Buck's concerns about Aranda, including the claim Aranda "was full of rage last week . . . that I am *frightened* by him—that I believe he could 'go off' at anytime and that he is dangerous because he cannot voice his anger until it . . . becomes rageful." [Emphasis in original.] Buck further informed Respondent Aranda "has some 'irrational feelings' toward me, that he should work another shift." In closing, Buck mentioned he reported the underlying incident that led to his writing the missive to his union representative. Buck's testimony that Kaufman was [so] upset he gave the Union

[11] According to Kaufman, the issue arose when she was discussing with Joe how employees account for compensatory time. During the discussion, Joe informed her "that no paid Westside time, or any Westside time can be used for attending union meetings." Kaufman could not recall if she informed other employees of this restriction on their lunch and compensatory time.

[12] Buck was uncertain and admittedly confused about the time of this meeting.

a copy of the note was unrefuted. Kaufman told Buck, "Because you passed this on to Daz [Lamparas], now we have to go and have a complete investigation of this. Westside needs to be involved because you went ahead and contacted the union."

Cosgrove began supervising Buck in the summer of 1996. As part of this supervision, Cosgrove met with Buck to review his work performance, often holding these reviews at local coffeeshops. During several of these meetings, Cosgrove indicated dissatisfaction with Buck because Buck "was in some sort of interpersonal conflict or difficulty, either with coworkers, administrators, or anybody, and that we were talking about those kind of themes." Cosgrove admitted telling Buck "that he like[s] to stir up shit." In explanation, Cosgrove testified:

> [W]hat I meant by that was that he seemed to get into difficulty with people so often on the job and so frequently, that I couldn't imagine him doing it without enjoying it to some extent. And I wondered what that was about.

Buck admitted when Cosgrove made this comment he "Just told me that he was tired of the things that I had been doing at work." Cosgrove alluded to the dog incident and Buck's calling Kilpack a witch. While Buck could not recall the details of this conversation he acknowledged "that there was a general disfavor with me and that this couldn't continue." There is no claim any reference was made to Buck's union activities.

Cosgrove discussed the transfer of Buck to the day shift with Kaufman. According to Cosgrove, who I find was a credible witness based on his appearance that he was attempting to answer the questions fully and accurately. According to Cosgrove:

> Again, there had been ongoing concerns with Mr. Buck and Mr. Aranda for several months, if not a year, and both of them at different times had expressed dismay at working together and being able to function adequately on the shift. I think the other things that went into it were the facts that Roger had been in trouble in a lot of different ways, and it was thought that the best way to give him more and adequate supervision to hopefully rectify that trouble, was to put him on the day shift.

Another incident involving Buck involved a television set. The television set had been removed from a public area and placed in Edwards' locked office with the instructions to staff that they should not remove it from the office during work hours. Contrary to this instruction, Buck entered the locked office and removed the television from the office. Cosgrove considered this action as a blatant disregard of policy. After the incident with the television, which Aranda informed Kaufman about, Buck was removed from assignment as officer of the day. Such removal is not claimed to be violative of the Act or otherwise improper.

After discussing the situation with Cosgrove, Kaufman decided to transfer Buck to the day shift:

> based on a number of things. It was based on the incident with the TV set, where after I had made it very clear in a staff meeting that's documented in the staff meeting notes, that I did not want staff to watch TV during our operation hours, and to my knowledge, the TV set was locked in Velour Edward's office. After I heard that the TV set was out, I discussed that with Mr. Buck, and I wrote up a firm verbal warning based on that. Then there was the incident with the dog. And there were some other instances related to things that occurred with other staff members that went into my decision that I felt that the reasonable and prudent thing for me as a supervisor to do was to bring him on to a shift where I could monitor his safety, because he had concerns about that. . . . He thought that there was a potential that Ricardo Aranda was going to physically harm him . . . and there were some other clinical things that happened where I questioned his judgement.[13]

Prior to making this transfer decision, Kaufman compared Buck's and Aranda's work history and determined "the number of complaints and the problems that I had with Mr. Buck were more significant. I didn't have any with Mr. Aranda, per se." Kaufman convincingly testified Buck's union activities did not enter into her decision to transfer Buck. Kaufman clearly denied being antiunion and noted she "was very instrumental in getting the California Nurses Association, which is a professional union, into two hospitals in the East Bay. Kaufman was also a member of a union.

Buck was transferred to the day shift which meant the loss of the privilege of working one-half an hour less on those days when work was sufficiently slow to permit the late shift workers to leave early. Because the day-shift hours interfered with his Wednesday work at the elementary school, Buck eventually quit his job with Respondent. There is no allegation Buck was constructively discharged.

On July 30, Lamparas renewed the Union's requests of March 4 and May 15, for "copies of all disciplinary notices, warnings or records of disciplinary actions for the last year. Respondent admittedly failed to provide this information. It was not until Respondent's representatives testified herein that it raised the claim the request was too burdensome, because it requires reviewing hundreds of personnel files. Respondent has not provided this information. This letter also requested copies of the documentation concerning Kilpack's complaints about Buck. Joe promised to provide the information Kilpack prepared about Buck but the Union never received it. Lamparas said he requested the information to assist the Union in representing Buck.

Conclusions

I find the General Counsel has failed to carry his burden of proving Buck's transfer to the day shift was based on a proscribed motive. At the commencement of his employment with Respondent, Buck agreed to be available to work other shifts. He admitted he was accused of unprofessional behavior in regard to the name calling incident and further created problems with his coworker, Aranda. The dog incident was another minor consideration in the determination to transfer him. Buck failed to heed Kilpack's instruction and brought the dog back to the facility and left it unattended when he went on a call. Buck's supervisor, Cosgrove, spoke to him about his work problems. Moreover, Kaufman's testimony Buck's union activities did not enter into her decision to transfer Buck is credited. However, even discounting Kaufman's testimony on this point, I conclude the General Counsel has not met its burden of persuasion Buck's protected conduct was a substantial or motivating factor in the decision to transfer him to the day shift. *Farmer Bros. Co.*, 303 NLRB 638 (1991); *Western Tug & Barge Corp.*, 207 NLRB 163 fn. 1 (1973).

[13] Buck admitted Kaufman informed him:

> because of all the problems alluding to the issue with Ricardo, for one. That was really the main one at that point. They said, "Because you're afraid of him, then we'll change your hours and put you in the day." And that, "You need more supervision, and we'll put the same hours as Dr. Cosgrove so he can supervise you more closely."

Buck informed his superiors he was afraid of Aranda, and suggested to management that Aranda be assigned to another shift. Management agreed with Buck that either he or Aranda should have their shift changed. Buck's disregard of explicit instructions not to remove the television set from a locked office was another consideration in Kaufman's decision to transfer him. As Cosgrove credibly testified: "I think the other things that went into it were the facts that Roger [Buck] had been in trouble in a lot of different ways, and it was thought that the best way to give him more and adequate supervision to hopefully rectify that trouble, was to put him on the day shift." According to Kaufman's unrefuted testimony, Buck also had other problems with staff members. Thus, even assuming the General Counsel has carried his burden of persuasion that union animus was a reason Buck was transferred, Respondent has demonstrated it would have transferred Buck absent any protected activity for valid business reasons. *Manno Electric*, 321 NLRB 278 fn. 12 (1996). Accordingly, I recommend this allegation of the complaint be dismissed.

For the previously stated reasons concerning the information requests Lamparas made on behalf of Spencer and Hollenbeck, I find the information requested by the Union concerning Buck's transfer was relevant, and Respondent had an obligation to provide the information or inform the Union why it could not, to permit bargaining over compromises, or to provide a basis to conclude Respondent had a substantial interest in the confidentiality of any of the requested information. Respondent's refusal and continuing failure to provide this relevant information violated Section 8(a)(5) and (1) of the Act.

3. Creating a bargaining unit position entitled "Administrative Assistant II"

The General Counsel alleges Respondent violated the Act by creating about April 30, a bargaining unit position entitled "Administrative Assistant II." Respondent's claim the position has existed at least since 1993 was unrefuted. I find Edwards and Stevens to be credible witnesses. They testified in a direct and open manner, without hint of device. Respondent entered into additional contracts with San Francisco which necessitated the staff changes. According to Stevens:

> What occurred this past year is that, in terms of our reorganization, we reassessed what the clerical and support staff needs were for the different units, and what came out of that was the creation of additional Administrative Two positions that would become available within the different programs. Additionally, we had developed new programs over the past year, and some of the new programs required a higher level of administrative support, and so those programs were also assigned an Administrative Two position.

No employees lost positions as a result of the reorganization. Donna Issac applied for one of these additional positions and failed to obtain the position because she failed the typing and computer test she was given to determine if she qualified for the position. There was no specific evidence any unit employee were affected by the increase in Adinistrative Assistant II positions.

The subject of the Administrative Assistant II position was raised by Lamparas during a negotiation session. Lamparas commented he had received inquiries from some unit members about the position. Stevens explained:

> what we were creating, that these were new jobs, that staff were not going to be displaced, that the support staff had been given ample opportunity for training that the agency paid for, and had been an ongoing process, in terms of exposing staff to training to increase their skills, and that it was an opportunity for those that were able to achieve the standards to move up to a higher level support position.

Stevens cannot recall the subject arising again and there is no claim it was ever raised again during negotiations. Lamparas claims in response to his request to bargain over the matter, he was informed there would be no layoffs, "nobody would lose their job." The Union wrote Respondent a letter on May 15, seeking information about the Administrative Assistant II position and Lamparas recalled Respondent giving some information about the position during negotiations. Stevens testified without refutation that the reorganization of the administrative position, including the administrative support staff, has been ongoing for the past 2 years. Prior to last June, Respondent admittedly did not inform the Union about this reorganization. The date Respondent started planning and implementing this reorganization is not a matter of record. The nature and extent of the reorganization is also not a matter of record.

Conclusions

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." As defined in Section 8(d) of the Act, collective bargaining is the mutual obligation of the employer and the union "to meet . . . and confer in good faith with respect to wages, hours, and other conditions of employment." Thus, an employer violates Section 8(a)(5) and (1) of the Act by making "a unilateral change in conditions of employment." *NLRB v. Katz*, 369 NLRB 736, 742–743 (1962).

As held in *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41 (1997):

> One purpose of initial notice to a bargaining representative of a proposed change in terms and conditions of employment is to allow the representative to consult with unit employees to decide whether to acquiesce in the change, oppose it, or propose modifications.

I find the General Counsel has failed to sustain his burden of proving there was a unilateral change in working conditions. The unrefuted evidence establishes the addition of new programs resulted in an increase in the number of Administrative Assistant II positions. There was no evidence the nature and scope of the duties of these job holders was altered; only that the number of these positions was increased. There is no evidence the the Union waived its right to bargain over a reorganization which affected unit positions. However, the only evidence indicates additional business resulted in the need for additional Administrative Assistants II employees and lower-level employees were offered the opportunity to advance into these additional positions. Under these circumstances, I conclude there was no demonstration there was a change in terms and conditions of employment. To hold otherwise would foreclose Employers from adding staff as business increases without first bargaining with the Union. The mere addition of staff positions is not a unitlateral change in terms and conditions of employment. Accordingly, I conlcude this allegation should be dismissed.

4. Fingerprinting

Stevens and Edwards testified convincingly that Respondent did not impose a requirement that all employees be fingerprinted. As Stevens explained:

> Basically we're required for our license to operate our non-public school to have all staff in that particular program fingerprinted. We're also required to fingerprint staff that would work in—if we were to operate, and we currently do not operate, residential programs, whether they're for adults or minors. The law requires that all employees must be fingerprinted. Originally, under our old administrative structure, the school program was operated by, was supervised by a program director. Our other youth program that was located in the same building was supervised by another program director. In our reorganization the administration of our Child, Youth, and Family services and school fell within that department, came under the directorship of one person. And in the reorganization, the whole purpose for the reorganization was to really integrate the services that we provide. So what happened in that reorganization is that staff that typically worked in our Youth Awareness program upstairs in the fourth floor, would begin to have more contact with our students that were located on the first floor of the building, and for that reason, the staff in those programs began to—were required to be fingerprinted as well, because they began to provide services to the students in that particular school program.

Conclusions

The General Counsel argues Respondent unlawfully implemented changes in its fingerprinting procedures without informing and bargaining with the Union. I agree with the General Counsel fingerprinting should by analogized to drug testing as a mandatory subject of bargaining which is not obviated by the existence of a State statue requiring fingerprinting. Citing *Johnson-Balemar Co.*, 295 NLRB 180 (1989); *Tocco, Inc.*, 323 NLRB 72 (1997); *Delta Tube & Fabricating Corp.*, 323 NLRB 153 (1997). However, I conclude counsel for the General Counsel failed to establish Respondent implemented a unilateral change in its established fingerprinting policies and practices.

Respondent did not expand the fingerprinting requirements to employees who are not connected to the school program. The unrefuted testimony is that Respondent followed the legal requirements of having all employees who have contact with its school children in a school setting fingerprinted. During negotiations, Lamparas recalled Stevens and informed the Union Respondent had to comply with the law within a certain time frame and could not wait for the formulation of a negotiated practice. On cross-examination, Lamparas admitted Stevens "explained that any employee of Westside who might, at some point, come in contact with a minor is required by state law to be fingerprinted, and that's what they were doing." That more or different employees were determined to meet this existing parameter, does not establish Respondent effected a unilateral change.

There was no evidence Respondent altered its fingerprinting policy. Respondent had an existing policy of fingerprinting employees who were expected to come into contact with school children in a school setting, consonant with the requirements of state law. There is no evidence this policy was altered or that Respondent acted in a manner inconsistent with its past policy and practice. I find the General Counsel's claim the Respondent's failure to cite the applicable state statute diminishes its position to the point of requiring the finding of a violation to be without merit. The General Counsel failed to demonstrate Respondent altered this preexisting rule, accordingly, this allegation should be dismissed.

5. The Union's request for additional information

In addition to the information requests discussed above concerning the disciplinary action taken against Hollenbeck, Spencer, and Buck, by letter dated March 4, 1997, Lamparas requested 11 items of information "to determine costs of potential proposals and to make decisions about whether to present specific proposals for negotiations;" 6 items of information concerning workers compensation benefits and safety at the work site "[f]or the purposes of bargaining;" 4 items to assist the Union in proposing "a reasonable and fair attendance policy"; information concerning "any bonuses, prizes or special benefits which are awarded to individuals during the course of their employment;" copies of any "oral or written agreements with individual employees"; information concerning "any company paid or sponsored life insurance program"; and information relative to Respondent's practices of promoting employees within the unit and to positions from within the unit to jobs outside the unit.

The Respondent provided some of the information requested in the March 4, letter. The Union noted some discrepancies in the material and on May 15, requested clarifications. One request not met was for: "any contracts with San Francisco; including the dollar amount of the contract and the beginning and ending dates of the contract." Lamparas explained the relevance of his request as follows:

> [T]he Union wanted to know how much money that the Westside received from the City because that's where the source of their fundings—most of the fundings, and so when we bargain wages and other monetary issues.

Another unanswered information request in this letter was for "copies of all disciplinary notices, warnings or records of disciplinary actions for the last year." Lamparas claimed this request was relevant:

> because since the Union was certified as the agent, exclusive bargaining representative of Westside employees, there were employees who—there were employees who were disciplined. We wanted to know whether there has been a practice that Westside had been implementing that we considered progressive discipline, because Hollenbeck and Spencer were, as far as the Union was concerned, were severely punished, and we wanted to know what's the pattern of disciplinary actions that Westside have been taken in the past.

Concerning the workers' compensation requests, Respondent did not provide "A copy of all on the job accident reports for the last two years;" or "A copy of all workers' compensation claims along with a copy of any document which shows any resolution whether by settlement or litigation for any such claim for the last two years;" and "if you paid any penalties for late payments or otherwise, the name of the person to whom such payments were made, the amount of the payment and the reason for such payments for the last two years." Lamparas testified he requested this information:

> That is important for the Union because we wanted to know whether there are, or there were employees who were injured in the past that are either covered by the Workman's Compensation Insurance or not. So we can bargain over the impact of that stuff.

Regarding the attendance policy requests, the Union did not receive "A copy of the attendance record for the last two years of any employee who has been warned either orally or in writing, suspended, terminated or otherwise disciplined because of an attendance problem." Lamparas claimed the information is relevant:

> because we were proposing a grievance procedure, and language and discipline, the Union wanted to know what's the practice of Westside in terms of disciplining employees.

I find the Union did receive the requested information concerning bonuses.

The Union did not receive the information requested concerning employee bonuses.[14] According to Lamparas' uncontroverted testimony:

> Our members are interested in any bonuses and other prices [prizes] or special benefits. The Union did not receive a copy of that except last December, 1997 when management and the Union agreed to have a one-time bonus only. The Union received the information of who are those people who received bonuses last December, 1997, but prior to that, no.

The Union's request for oral or written agreements was not met. The Union claims the information is relevant to its representational duties because "we want to bargain over that effect."

The Union did not receive some of the information it requested about promotions.[15] The asserted relevance of these requests is:

> [T]he Union wanted to know what is the system taking place at Westside in terms of promoting employees so that we can bargain over that effect. . . . We wanted to know people who have been denied promotion, we wanted—the Union wanted to know what's the practice or procedure of denying or not denying, so that we can bargain over that in the process of our collective-bargaining process.

Lamparas could not recall if Respondent informed the Union the requested information concerning the discipline of employees over the past 2 years "would require Westside to examine hundreds of files of employees to try to find that information." Lamparas acknowledged the size of the bargaining unit is approximately 140 to 150 individuals and that there is substantial employee turnover. Stevens estimated Respondent would have to review about 200 personnel files to provide the information about employees disciplined over the past 2 years. There is no clear claim Respondent informed the Union why it had not provided this information.

[14] Specifically, the Union requested:

> A list and description of all bonuses, special benefits or rewards or other unusual cash or other gifts given to employees during the last tow years. The list should also include those that were available but were not given to employees.

[15] Specifically, the Union requested and was not provided:

> A list of all employees who have been promoted either within classifications within the bargaining unit or from classifications within the bargaining unit to positions out side the bargaining unit for the last five years. For each such person please give the job classifications, the classification to which promoted, the date of the promotion, the pay rate when promoted, the pay rate of the promotion, the reason or reasons for the promotion.
>
> With respect to all employees who have been denied a promotion within the last five years please give the name of the employee, the date of the denial of the promotion and the reason or reasons the person was denied promotion.

Respondent partially met the following request:

> With respect to all positions which have been filled by hiring from the outside please state the date an opening occurred, the nature of the position, the pay rate and the reason or reasons individuals were hired from the outside rather than promoting indi viduals from within.

Conclusions

It is well settled the employer's statutory duty to bargain in good faith incudes the duty "to provide information that is needed by the union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 310, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–437 (1967). The failure to provide relevant information upon request violates Section 8(a)(5) and (1) of the Act. "The Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is sufficient to give rise to an employer's obligation to provide information." *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

I find the Union has satisfied its burden of establishing the relevance of the requested information. The Union informed Respondent in the first paragraph of the March 4 letter the information was requested to assist the Union in framing its proposals for the initial collective-bargaining agreement as well as to assist the Union in responding to proposals made by Respondent. The information was patently relevant to the Union's ability to "properly assess the employer's proposals and, concomitantly, to properly formulate bargaining proposals of its own." *Decker Coal Co.*, 301 NLRB 729, 740 (1991); *United States Testing Co.*, 324 NLRB 854 (1997).

As found above, Respondent has failed to establish records were confidential or any of the requests were unduly burdensome. Respondent claims the contracts with San Francisco were redundant to information already provided to the Union. This claim was first raised during this proceeding. Respondent did not inform the Union all the information needed for preparation of the Union's economic proposals or assessment of Respondent's economic proposals had already been provided. These contracts were not claimed to be irrelevant, just redundant. The basis for this claim was not advanced by Respondent

Even if Respondent asserted the contracts were irrelevant, if its claim similar information had been supplied pursuant to the information request for financial information, this request has similar relevance and I conclude Respondent, by its actions, admitted the relevance of the information. The Union not only requested the contracts, but also their beginning and ending dates. Respondent did not provide this information which may be of assistance to the Union in formulating or addressing proposals for inclusion in a collective-bargaining agreement.

The requested copies of all disciplinary notices was again requested, not only for pending grievances, but to assist the Union in determining if Respondent had a system of discipline and to help in formulating proposals concerning discipline for inclusion in the collective-bargaining agreement. Inasmuch as disciplinary practices are existing terms and conditions of employment, they are presumptively relevant.

If Respondent considered the Union's requests for information unclear or excessive, it had an obligation to inform the Union of its position and request clarification. As noted in *Holiday Inn Coliseum*, 303 NLRB 367 fn. 6 (1991); "The Employer may not simply refuse to comply with an ambiguous or over broad information request, but must request clarification and/or comply with the request to the extent that it encompasses necessary and rele-

vant information." See also *A-Plus Roofing*, 295 NLRB 967 fn. 7 (1989). Further, as noted in *Honda of Hayward*, 314 NLRB 443, 450 (1994):

> Respondent's failure to raise at the outset any issue concerning the possible costliness or burden of complying with the Union's request, undermines its claim of burdensome as a defense. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 353 fn. 6 (D.C. Cir. 1983) If a party "does wish to assert that a request for information is too burdensome, this must be done at the time information is requested and not for the first time during the unfair labor practice proceeding." Id. quoting Gorman, *Basic Text on Labor Law,* 417 (1976). See also *Westinghouse Electric Co.*, 129 NLRB 850, 866 (1960).

Moreover, Respondent failed to substantiate its claim of undue burden. Only the number of employee files to be reviewed was placed in evidence. There was no estimate of the number of man hours and expenditures needed to meet the Union's request for this information. I therefore conclude Respondent merely made a bare claim the request was burdensome, and failed to meet its obligation of establishing this affirmative defense.

Respondent also raised for the first time during this proceeding the objection some of the employee files were of individuals who were not in the unit. There was no colorable showing the information requested contained confidential information. Again, this bare claim fails to support an affirmative defense. Respondent has failed to establish a convincing evidentiary predicate for this claim. As noted in *NLRB v. Pfizer, Inc.*, 763 F.2d 887, 891 (7th Cir. 1985); "the burden of showing a legitimate claim of confidentiality should be on the employer who is resisting production."

However, where a union is seeking to obtain information about employees who are outside the bargaining unit, the union has the burden of establishing relevance without the benefit of a presumption of relevance. *E. I. du Pont & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984). However, the same test for relevance is applied to such cases. *Prudential Insurance Co. v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969). Since the Union was recently certified as the unit employees' collective-bargaining representative, much of the information concerning discipline could involve actions taken by Respondent at times when none of its employees were represented. Whether the employee was represented or not, the disciplinary actions Respondent took would still have relevance to formulating collective-bargaining agreement proposals.

The Union established it has a reasonable basis for requesting the information when it informed Respondent it wanted to determine if it had any disciplinary policies or practices to assist it in formulating collective-bargaining agreement proposals. *CEK Industrial Mechanical Contractors*, 295 NLRB 635, 637 (1989). The Union, shortly after receiving certification as the units employees representative, had three employees disciplined. Respondent denied two of these employees their *Weingarten* rights and displayed reticence as well as unwillingness to provide the Union with information relevant to its duties to represent these employees at subsequent grievance meetings. These actions by Respondent, provided a factual base for the Union to request the information. I find the Union met its burden of showing the probable relevance of the requested information.

The information requested concerning workers' compensation is analagous to requesting health benefit plan information, to enable the Union to investigate a carrier's financial reputation and determine the Employer's policies concerning this coverage. I find the information regarding workers' compensation is relevant and Respondent is obligated to provide this information to the Union. *Honda of Hayward*, supra, 314 NLRB 443 (1994).

The information the Union requested concerning Respondent's attendance policies and promotions are also matters concerning terms and conditions of employment which are presemptively relevant to the Union in its role as exclusive representative of the unit employees and Respondent is obligated to provide this information. *GTE California, Inc.*, 324 NLRB 424 (1997).

Based on the foregoing, I find Respondent violated Section 8(a)(5) and (1) as alleged in the complaint, by failing since March 4, 1997, to furnish the Union with the requested information.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is the exclusive representative for the purposes of collective bargaining of the employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All full time, regular part-time and on-call professional and non-professional employees employed by the Employer at all of its San Francisco, California locations; excluding managerial employees, confidential employees, guards and supervisors as defined by the Act.

4. By denying its employees' requests to be represented by a union representative and/or lawyer during investigatory interviews, in which the employees had reasons to believe disciplinary action would be, and in fact, was, taken against them; and, by prohibiting employees from discussing their discipline at any time, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights protected by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.
5. By unilaterally, and without providing notice to the Union, discriminatorily implementing a new policy concerning how employees could use their lunch hours and compensatory time, the Respondent violated Section 8(a)(5), (3), and (1) of the Act.
6. By refusing to provide the Union with requested information relevant to the Union's proper performance of its collective-bargaining duties and the exclusive bargaining representative of an appropriate unit of the Respondent's employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
7. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
8. Unless state above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, I recommend it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act, including the posting of a notice marked "Appendix."

Having found Respondent denied Hollenbeck's and Spencer's requests to be represented by a union representative and/or lawyer, during investigatory interviews, in which these employees had reason to believe disciplinary action would be, and in fact was taken against them, and that by so denying, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I order that Respondent cease and desist from engaging in such unlawful conduct, and that it take certain affirmative action to effectuate the purposes of the Act.

Having found Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the information requested in several letters, information requests which, pursuant to Section 8(a)(5), Respondent was obligated to furnish, I shall recommend, among other things, that Respondent furnish the requested information which I have found, supra, Respondent was legally obligated for furnish.

Having found Respondent has unlawfully unilaterally and without notice, discriminatorily altered its policy and practice concerning the employees use of their lunch hours and compensatory time, in violation of Section 8(a)(5), (3) and (1) of the Act.

[Recommended Order omitted from publication.]